No. 84-261

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION, PETITIONER

v.

GARY WEINTRAUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Respondents have not provided any reason why certiorari should not be granted in this case. They recognize (Br. in Opp. 5) the importance of the question presented and, for the most part, seek merely to defend the decision below on the merits.

1. Respondents' attempt (Br. in Opp. 10-12) to distinguish this case from the conflicting decisions of the Second, Eighth and Ninth Circuits is unpersuasive. The court below recognized (Pet. App. 15a-16a) that its decision is in conflict with *Citibank, N.A.* v. *Andros,* 666 F.2d 1192 (8th Cir. 1981), which held that the trustee of a corporation undergoing liquidation may waive the debtor's attorney-client privilege by virtue of his "broad power to manage the affairs of the debtor" and his succession to former management's rights (*id.* at 1195). Although *Citibank* was decided under

the former Bankruptcy Act, the relevant provisions of the current Bankruptcy Code are not materially different.[1] Under both statutes, the trustee has management authority over the bankrupt estate. Accordingly, *Citibank* has, with the exception of the decision below, consistently been followed in cases arising under the present statute. See *In re Boileau*, 736 F.2d 503, 505-506 (9th Cir. 1984); cases cited at Pet. 5-6 n.5.

Respondents' argument (Br. in Opp. 11-12) that the Ninth Circuit's decision in *Boileau*[2] is limited to its "unique facts" is without merit. As the court there made clear (736 F.2d at 506), the only unusual fact presented was that an examiner had been granted by stipulation the management authority over the debtor that would normally reside in the trustee. The court therefore looked to the cases addressing the trustee's authority to waive the attorney-client privilege, and adhered to the majority rule rejected by the court below.[3] The only limitation on its holding was with respect to examiners, who usually possess less authority than trustees (*ibid.*).

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[1]See 2 *Collier on Bankruptcy* para. 323.01, at 323-2 to 323-3 (L. King 15th ed. 1984):

> [S]ection 323(a) [of the current Code] * * * is based on the same reasoning as the provision for the vesting of title in the trustee under Section 70a of the [former] Act with a view toward the effective liquidation of the debtor's property.

The trustee's authority over the bankrupt estate (see 11 U.S.C. 541) is thus for present purposes equivalent to that provided by the title-vesting provisions of the former Act.

[2]We note that, since our petition in this case was filed, the court of appeals has denied a petition for rehearing in *Boileau* (No. 83-6259 (9th Cir. Sept. 27, 1984)).

[3]Indeed, the *Boileau* court cited (736 F.2d at 505) the instant case as directly contrary authority. The cases cited by respondents (Br. in Opp. 16) in support of their position on the merits simply do not address the question of who is the proper party to waive a debtor's attorney-client privilege.

2. Respondents appear to suggest (Br. in Opp. 17-18) that this case turns on the question whether the trustee's waiver was in the best interests of the debtor's estate. But that issue is irrelevant to the question presented, which is whether a trustee has the *power* under the Bankruptcy Code to waive the privilege. Respondents did not raise the question whether the waiver here was justified, nor did the court below reach it. Rather, respondents argued, and the court held, that the trustee lacks the power to waive the privilege whether or not it is in the best interests of the estate. Virtually every other court has held otherwise (see Pet. 5-6 & n.5).[4]

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[4]Respondents also argue (Br. in Opp. 8-9) that the question presented should be resolved by Congress rather than the courts. But 11 U.S.C. 542(e), on which they rely, does not bar the trustee from waiving the debtor's privilege, and its legislative history (cited at Pet. 9 n.8) makes clear that Congress contemplated that the issue would be resolved by the courts. See *Citibank, N.A.*, 666 F.2d at 1195. Similarly, Congress evinced its intent in Rule 501 of the Federal Rules of Evidence that the courts develop and interpret the law with respect to privileges. Although Congress did not adopt proposed Rule 503(c), 56 F.R.D. 183, 236 (1972), which recognized the power of trustees to control the privilege, it did not, as respondents suggest (Br. in Opp. 9), reject the Rule on the merits. Rather, the proposed Rules were rejected in order to allow the courts to continue to develop a federal common law of privileges. *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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